

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
LOW TECH DESIGNS, INC.) CC Docket No. 97-164
)
Petition for Assumption of Jurisdiction)
from Georgia Public Service Commission)
Pursuant to Section 252(e)(5) of the)
Communications Act)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION OF BELL SOUTH

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby oppose the Petition for Commission Assumption of Jurisdiction ("Petition") that was filed on July 11, 1997 by Low Tech Designs, Inc. ("LTD"). The Petition asks this Commission to assume jurisdiction from the Georgia Public Service Commission ("GaPSC") pursuant to Section 252(e)(5) of the Communications Act, based on the alleged failure of the GaPSC to conduct an arbitration between LTD and BellSouth pursuant to Section 252(b) of the Communications Act. By Public Notice released July 24, 1997, DA 97-1573, the Commission advised the GaPSC and BellSouth that comments on the LTD Petition are due today. BellSouth is the incumbent local exchange carrier ("ILEC") that is the other party to the proceeding before the GaPSC that gave rise to this action, and therefore BellSouth has standing as a party in this proceeding pursuant to the Commission's Rules. 47 C.F.R. Sec. 51.803(a).

I. Background.

In its Petition, LTD asserts that it "considers itself to be a telecommunications carrier as defined by Sections 3(49) [sic] and 252(a)(1) of the Act respectively, and applicable Commission rules and interpretations."¹ It asserts that it attempted to negotiate an interconnection agreement

¹ Petition, ¶ 1.

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with BellSouth in Georgia, and that when the negotiations proved unsuccessful, LTD filed a timely petition for arbitration before the GaPSC on January 16, 1997. The case was assigned Docket No 7270-U. The GaPSC issued a Procedural Order on February 5, 1997 and appointed a Hearing Officer to conduct the arbitration. On February 14, 1997, BellSouth filed an Answer and a Motion to Dismiss the LTD petition. On March 10, 1997 the Hearing Officer conducted a pre-arbitration conference, at which time the parties argued over whether LTD was a telecommunications carrier proposing to provide a telecommunications service in Georgia. The Hearing Officer issued an order on March 28, 1997, referring that issue to the GaPSC for resolution. The parties engaged in discovery and filed written testimony in late March and early April. On April 9, 1997 BellSouth filed a second Motion to Dismiss, formalizing its argument that LTD is not a "requesting telecommunications carrier" under Section 251(c)(3) entitled to arbitration under Section 252(b). LTD subsequently filed an application for certification as a telecommunications carrier with the GaPSC that LTD admits "was, and still is incomplete ...".² On May 19, 1997 the GaPSC dismissed "without prejudice" the LTD arbitration petition.³ On May 27, 1997, LTD filed a Motion for Reconsideration, Rehearing and Oral Argument of Commission Order Dismissing the Arbitration. On June 19, 1997, the GaPSC denied LTD's motion for reconsideration.

II. The GaPSC Orders.

The GaPSC Order held that:

Low Tech is not, at least at this time, a telecommunications carrier proposing to provide telecommunications services in Georgia, and therefore is not entitled to

² Petition at 5, fn. 4.

³ In re: Petition by Low Tech Designs, Inc. for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996, Docket No. 7270-U, Order Dismissing Arbitration, released May 19, 1997, at 1 ("Order").

initiate compulsory arbitration before this Commission under Section 252(b) of the Telecommunications Act of 1996 ("Act").⁴

Describing its decision as "an important jurisdictional question of first impression before this Commission", the GaPSC held that it would not permit a person that had not obtained a certificate of authority to provide telecommunications services in Georgia to invoke the compulsory arbitration provisions of Section 252(b):

The Commission will not consider an entity to be a telecommunications carrier in Georgia, unless and until it has obtained a certificate of authority. Georgia's Telecommunications and Competition Development Act of 1995 ("Georgia Act") at O.C.G.A. § 46-5-163(a) provides that a telecommunications company shall not provide telecommunications services without a certificate of authority issued by the Commission. This type of certification requirement is not preempted by the 1996 Act, which provides at section 253(b) [47 U.S.C. 253(b)] that nothing in that section ("removal of barriers to entry") "shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254 [universal service], requirements" such as the financial and technical capability required of competing local exchange companies ("CLECs") required by O.C.G.A. § 46-5-163(b).

Requiring that a company obtain a certificate in order to be a telecommunications carrier also furthers other reasonable, legitimate legislative objectives under the Georgia Act. Telecommunications carriers are subject to the Commission's jurisdiction, must meet applicable requirements of Georgia law including the Georgia Act, and must comply with the Commission's rules. The obligations of telecommunications carriers include contributing to the Universal Access Fund. The Commission cannot feasibly administer its responsibilities, determine who the telecommunications carriers are, and ensure that such carriers meet their obligations, unless there is a basic mechanism such as the certification requirement contained in O.C.G.A. § 46-5-163(a).⁵

In its Recon. Order, the GaPSC further stated:

The Commission properly denied LowTech's request that the state certification requirement be waived. Allowing such a waiver could force the Commission to entertain compulsory arbitration cases litigated by companies that may never obtain certificates to provide any telecommunications services in Georgia. Such a

⁴ Order at 1.

⁵ Order at 3-4.

result in not appropriate as a matter of public policy and does not appear to the a reasonable reading of the 1996 Act's jurisdictional requirements.⁶

The Commission made it clear that its dismissal of the LTD petition was "without prejudice," and that LTD may, once it obtains a certificate of authority, submit a new petition for arbitration.⁷ The Commission went on to hold that if LTD obtains a certificate of authority, it will not have to start the negotiation process over from scratch, but could immediately request arbitration.⁸

III. Section 252(b)(5) and the Commission's Implementing Regulations.

Section 252(b)(5) provides:

COMMISSION TO ACT IF STATE WILL NOT ACT.--If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

On August 6, 1996, the Commission issued its Local Interconnection Order implementing the provisions of Sections 251 and 252 of the 1996 Act.⁹ In its implementing regulations, the

⁶ In re Petition by Low Tech Designs, Inv. for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996, Docket No. 7270-U, Order Denying Motion for Reconsideration, Rehearing and Oral Argument, released June 19, 1997 ("Recon. Order") at 4.

⁷ Order at 6

⁸ Recon. Order at 4.

⁹ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, FCC 96-325, released August 8, 1996, vacated in part, Iowa Utilities Board v. FCC, ___ F.3d ___, (Slip Op. released July 18, 1997) ("Local Interconnection Order").

Commission identified three circumstances in which it would assume the jurisdiction of a State commission under Section 252(b)(5):

For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in Section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in Section 252(b)(4)(C) of the Act.¹⁰

In the Local Interconnection Order, the Commission explained:

1285. . . . The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act.¹¹

IV. Argument.

LTD has utterly failed to carry its burden to justify preemption of the GaPSC by this Commission. LTD has not shown, and cannot show, that the GaPSC failed to initiate an arbitration proceeding in a timely manner, or failed to reach a decision within the time limit established by the 1996 Act. To the contrary, the GaPSC conducted a timely proceeding and reached a decision within the statutory deadline. LTD's sole remedy under the circumstances is to seek review of the GaPSC's decision in the United States District Court under Section 252(b)(6) of the Act.¹² This Commission has no jurisdiction to review the merits of the GaPSC's decision. If, however, this Commission nevertheless undertakes to review the GaPSC's interpretation of the

¹⁰ 47 C.F.R. Sec. 51.801(b).

¹¹ Local Interconnection Order, ¶ 1285 (citations omitted).

¹² 47 U.S.C. Sec. 252(b)(6).

1996 Act, the GaPSC decision is clearly correct. Furthermore, this Commission has no authority to preempt the certification requirements of Georgia law.

A. The GaPSC initiated a timely arbitration proceeding and reached a decision on the merits within the statutory deadline.

LTD has not shown that either of the requirements contained in this Commission's Rules for preemption of a state arbitration proceeding is present in this case. The Petition asserts that LTD filed its request for arbitration with the GaPSC on January 16, 1997.¹³ The GaPSC promptly appointed a Hearing Examiner and issued a Procedural Order to govern the proceedings. The issue of whether a person that has not been certified to provide telecommunications service in Georgia is "telecommunications carrier" within the meaning of the 1996 Act was joined, and was referred by the Hearing Examiner to the GaPSC for decision. Thereafter, discovery was conducted and testimony was filed by all parties. The GaPSC concluded that it must decide the case by May 19, 1997, and on that date it rendered its decision, dismissing the LTD request on jurisdictional grounds.¹⁴ Therefore, there is no basis for preemption under Section 51.801(b) of this Commission's Rules or under Section 252(b)(5) of the 1996 Act. LTD's Petition must be dismissed.

B. This Commission has no jurisdiction to review the correctness of the GaPSC's decision.

Under the 1996 Act, the exclusive means of reviewing a state commission decision under Section 252 is by means of an action in Federal district court. Section 252(b)(6) provides, in pertinent part:

In any case in which the Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district

¹³ Petition at ¶. 5.

¹⁴ Order at 2. LTD does not challenge the timeliness of the GaPSC decision.

court to determine whether the agreement or statement meets the requirements of this section.

The Eighth Circuit Court of Appeals recently held that a Federal district court action is the exclusive means of reviewing state commission decisions applying Sections 251 and 252.¹⁵ Thus, if LTD wishes to allege that the GaPSC violated Section 253(a) of the Act when it held that LTD must obtain a certificate of authority before it can bring a compulsory arbitration proceeding, it must bring that challenge in Federal district court. This Commission has no jurisdiction to review the GaPSC decision.

C. If the Commission reviews the GaPSC decision, that decision is clearly lawful.

LTD argues that the GaPSC's certificate of authority requirement is a barrier to entry that violates Section 253(a).¹⁶ LTD argues that since the Commission's rules require an ILEC to engage in good faith negotiations with a person that has not yet obtained state authorization to provide telecommunications services, a state commission is likewise bound to permit such a person to invoke the compulsory arbitration process under Section 252. LTD concedes that it cannot lawfully offer a telecommunications service in Georgia absent state certification.¹⁷ Nevertheless, LTD contends that the 1996 Act requires state commissions to devote enormous resources to arbitrate a dispute at the instigation of a person that may never qualify to offer telecommunications services in that state.¹⁸ This is not only a misreading of the law, but it makes

¹⁵ Iowa Utilities Board v. FCC, ___ F.3d ___ (No. 96-3321, Slip Opinion at 122).

¹⁶ Petition at ¶ 8. Section 253(a) provides: "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

¹⁷ See Petition at ¶ 7: "LTD has also viewed negotiations and arbitration as separate from state commission certification, which is properly required in order to actually obtain authority to offer telecommunications services."

¹⁸ LTD cites the Conference Report discussion of Section 251 as support for its view. Section 251 deals with the obligations of LECs. It has nothing to do with the arbitration obligations of State commissions, which are all found in Section 252.

no practical sense. The Act defines a “telecommunications carrier” as “any provider of telecommunications services.”¹⁹ A person who is not providing, and cannot lawfully provide, telecommunications services is not a “telecommunications carrier” entitled to invoke compulsory arbitration under Section 252.²⁰ The GaPSC held as much in the Order.

LTD’s claim that the GaPSC Order violates Section 253(a) overlooks the express reservation of state authority in Section 253(b):

(b) STATE REGULATORY AUTHORITY.—Nothing in this section affects the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

The GaPSC expressly relied on this reservation of authority in the Order, and explained why its requirement of a certificate of authority under O.C.G.A. § 46-5-163(b) is consistent with Sections 253(b) and 254 of the 1996 Act.²¹ Nothing in the 1996 Act preempts state requirements to obtain a certificate of authority prior to providing telecommunications services in a state.

There is an additional jurisdictional bar in this case. The 1995 Georgia Act predates the 1996 Federal Act, but nevertheless contains strong pro-competitive provisions opening the local exchange and exchange access markets in Georgia to competition. As the Eighth Circuit held recently, Section 253(b) prevents federal preemption of such progressive state laws, even if they vary from the 1996 Federal Act.²²

Having failed to demonstrate that the GaPSC’s requirement of a certificate of authority as a condition precedent to compulsory arbitration is subject to federal preemption, LTD makes a

¹⁹ 47 U.S.C. § 3(44).

²⁰ Indeed, if LTD is not a “telecommunications carrier, it is not entitled to interconnection or access to unbundled network elements under the 1996 Act.

²¹ See discussion from the Order quoted in Section II of these Comments, supra.

²² Iowa Utilities Board v. FCC, ___ F.3d ___ (No. 96-3321, Slip Opinion at 128).

flimsy attempt to evade the force of Section 253(b) by claiming that the requirement is not “competitively neutral.”²³ LTD contends that the GaPSC has approved negotiated agreements between BellSouth and new entrants before such entrants have obtained a certificate of authority. Even if true,²⁴ this is hardly persuasive. The amount of effort required for a state commission to review a negotiated arbitration agreement is in no way comparable to the burden of arbitrating a dispute between an ILEC and a new entrant. LTD does not allege that the GaPSC has previously arbitrated a dispute involving a person that was not certified at the time of the arbitration, and, as noted above, the GaPSC expressly declares that this case was one of first impression.

V. Conclusion.

This is not a case in which a state Commission has “failed to act” as required by Section 252(b)(5) before this Commission may preempt. The GaPSC conducted an arbitration proceeding and entered a ruling on the merits, finding that its jurisdiction was not properly invoked by LTD. LTD’s exclusive means of seeking review of that decision is an action in Federal district court. This Commission has no jurisdiction to review the lawfulness of the GaPSC decision. As shown above, the GaPSC decision is clearly lawful in any event. Therefore, the LTD Petition must be denied.

If LTD is serious about becoming a telecommunications carrier, it need only meet the minimum requirements of Georgia law and obtain a certificate of authority. The GaPSC has made it clear that if and when LTD obtains a certificate, it may renew its request for arbitration. If LTD will not, or cannot, qualify as a telecommunications carrier in Georgia, it is wasting the time of

²³ Petition at ¶. 9.

²⁴ LTD alleges that it received “verbal confirmation” of this assertion, but cites no specific agreements to support its allegations.

this Commission and the GaPSC in prosecuting meaningless legal actions. In any event, its present Petition must be denied.

Respectfully submitted,

BELLSOUTH CORPORATION and
BELLSOUTH TELECOMMUNICATIONS, INC.
By their attorney,

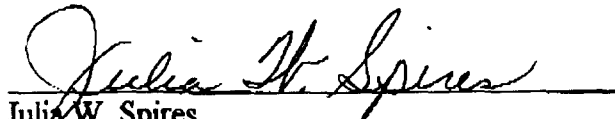
A handwritten signature in cursive script, appearing to read "M. Robert Sutherland", written in dark ink.

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July 28, 1997

CERTIFICATE OF SERVICE

I Julia W. Spires, do hereby certify that I have this 28th day of July, 1997, serviced all parties to this action with the foregoing "OPPOSITION" reference CC DOCKET 97-164, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid addressed to the parties as set forth on the attached service list.


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